1996

State of Utah v. Cortney Corwell : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
Plaintiff and Appellee,	)	
vs.	)	
CORTNEY CORWELL,	)	Case No. 960245-CA
Defendant and Appellant.	)	Priority No. 2

BRIEF OF APPELLANT

APPEAL FROM CONVICTION OF RECEIVING STOLEN PROPERTY IN VIOLATION OF UTAH CODE ANNOTATED §76-6-408 (1993) IN THE FIFTH JUDICIAL DISTRICT, IN AND FOR WASHINGTON COUNTY, JAMES L. SHUMATE PRESIDING

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BRIEF OF APPELLANT

APPELLATE JURISDICTION

Jurisdiction to hear this appeal is conferred upon the court of appeals by provision of Utah Code Ann. §78-2a-3(2)(f).

NATURE OF THE CASE

Defendant was charged with two misdemeanor counts of receiving stolen property in violation of Utah Code Ann. §76-6-408 (1993) (R 12-13). She was tried by a jury which returned a verdict of guilty on one count and acquitted the defendant of the offense charged in the second count (R 78-79). The defendant was sentenced to pay a fine in the amount of $150. Payment of the fine was suspended upon condition that defendant comply with the terms of a court order entered in an unrelated controlled substance conviction (R 85-87, 92-94). Defendant appeals the judgment, sentence, and order of probation (R 88).

STATEMENT OF ISSUES

The following issues are presented by this appeal. Each is accompanied by a citation to the record which demonstrates that the issue was preserved in the trial court.

1. Does the evidence support the verdict and judgment of conviction? (R 211-12).

2. Did the district court err in refusing to give defendant's proposed specific intent instruction? ($220-24).

3. Does the prosecutor's comment regarding defendant's failing to testify require reversal? (No contemporaneous objection).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The text of Utah Code Ann. §76-6-408 is set out in the Addendum.

STATEMENT OF THE CASE

In the fall of 1994, Mr. and Mrs. Elsberry rented their St. George condominium to the defendant, Cortney Corwell, and her sister, Cassie (R 151-52; Exhibit No. 1). Cassie was 22 at the time and the defendant was 18 (R 160-63, 201-02). Corwells apparently moved out of the apartment on December 31, 1994 (R 164-65, 218-19).

Elsberrys came to St. George on or about January 13 or 14, 1995 (R 154-56, 163-64). They discovered that the Corwell sisters were no longer residing in the condominium (R 154).[1] As Elsberrys approached the property Mrs. Elsberry saw four

[1]There was evidence indicating that Elsberrys had in fact given Corwells notice requiring them to vacate the premises by December 31, 1994. See R 216.

of their pillows in a Nisson hatchback which was parked a little more than 15 feet from the rental unit (R 156, 171). The pillows were in plain view (R 156, 172, 177).

The automobile belonged to the defendant and was obviously inoperable (R 172, 178, 181, 205-206). Apparently, it had not been driven for some time and remained in the same location from the time Elsberrys observed it on January 13 or 14 until at least March 7 (R 183, 189).

After inspecting the condominium, Elsberrys contacted the St. George City police and reported theft of several items of personal property. Elsberrys' complaint was assigned to Officer Bill Matthews on January 14, 1995 (R 178). Matthews took photographs of the defendant's car on January 20 (R 177) and acquired a warrant to search the car on February 1 (R 178). Nothing other than the four pillows which were clearly visible from outside of the vehicle were recovered in connection with the execution of the search warrant (R 10-11). This evidence provided the basis of the offense alleged in Count I of the Information.

When Matthews interviewed the defendant she denied taking Elsberrys' property out of the condominium and denied that she had possession of their property (R 180). According to Matthews, the defendant indicated that there were "a lot of people helping them move" and conceded that one of these individuals may have moved or misplaced some items (R 180).

On March 7, 1995, defendant again met with police officers.[2] At that time, she mentioned some "silverware and other utensils -- other utensils in boxes in her car" (R 184). Officer Scott Staley requested permission to re-examine the contents of

[2]Defendant's sister was not reinterviewed because she had moved to Jackson Hole, Wyoming (R 200).

defendant's automobile. Defendant consented (R 185-86). The vehicle was still inoperable and parked outside Elsberrys' condominium (R 185, 205-06). Staley's search produced nothing which belonged to Elsberrys (R 185-86). However, later that day during a consent search of a storage unit which the defendant's sister had rented, officers found a framed print which they and the defendant assumed had been taken from Elsberrys' condominium. It was located in a chest of drawers which belonged to the defendant (R 207-08). This print was the subject matter of the offense alleged in Count II of the Information.

When the state rested without presenting evidence of the ownership of the print and without presenting evidence from which the jury could reasonably infer that the defendant intended to deprive Elsberrys of the pillows, defendant moved to dismiss both counts (R 211-12). The motion was overruled and both counts were submitted to the jury.

Defendant was acquitted of the theft of the print and convicted of theft by receiving the pillows.

SUMMARY OF ARGUMENT

The facts and circumstances of defendant's "possession" of the subject property will not reasonably support an inference that she intended or acted with a purpose to deprive the owners of their property. Moreover, the court's instructions did not make it clear that this specific intent was an element of the charged offense.

Finally, defendant was prejudice by the prosecutor's comments on defendant's "failure" to testify in her own behalf.

ARGUMENT

POINT I

THE VERDICT AND JUDGMENT OF CONVICTION ARE NOT SUPPORTED BY THE EVIDENCE.

The evidence offered in support of defendant's conviction can be summarized as follows: After the defendant and her sister moved out of Elsberrys' condominium, four pillows which belonged to Elsberrys and which had been used in furnishing the condominium were found in plain view in the hatchback of defendant's car. That vehicle was apparently inoperable at all times relevant to this prosecution. It was parked in the lot, a little more than 15 feet from the rental unit. There was no proof that the defendant placed the pillows in the car, that she ever removed them from the condominium complex, that she ever handled or used them, or that she attempted to conceal them.

The elements of the alleged offense, in the context of the facts presented in this case, include: (1) that defendant obtained possession of property of another; (2) that defendant knew the property had been stolen or believed that it probably had been stolen; and (3) that defendant acted purposely to withhold the property permanently or for so extended a period that a substantial portion of use and benefit thereof would be lost. See State v. Murphy, 617 P.2d 399, 401 (Utah 1980). Cf. Utah Code Ann. §76-6-401(3)(a).

Murphy is instructive on several levels. In that case as in the instant case, the subject property was not damaged or disposed of under circumstances that would make it unlikely that the owners would recover it. Murphy, the defendant drove the subject motor vehicle for one evening and left it parked "in plain view" at 400 North 800

West, in Cedar City, Utah. The owners' address was shown on the registration and certificate of title as "800 West 400 North ¶56," which was apparently a space in a trailer park located at that intersection. Id. at 401.

Justice Maughan's lead opinion focused on the specific intent element of the offense of theft by receiving.

> The state's representation that the elements of the crime are merely two-fold, i.e., (1) receiving or disposing of the property, and (2) knowledge the property was stolen, evidences a fundamental misunderstanding of the statue and the very essence of the culpable activity. This general misunderstanding of the nature and scope of the crime must be remedied by this Court.
>
> . . . .
>
> Implicit in the language of the statute are the basic elements of the crime: (1) property belonging to another has been stolen; (2) the defendant received, retained or disposed of the stolen property; (3) at the time of receiving, retaining or disposing of the property the defendant knew or believed the property was stolen; and (4) the defendant acted purposely to deprive the owner of the possession of the property. Before the defendant can be convicted of the crime of receiving stolen property the prosecution must present a quantum of evidence sufficient to establish each element of the crime.

Id. at 401-402 (footnotes omitted).

In concluding that the state had failed to make a prima facie case, Justice Maughan noted that because proof of Murphy's intent was based exclusively on circumstance, "facts relating to the ownership, location and condition of the van become important." Id. at 403, n. 11. Applying the law to those facts, Justice Maughan wrote:

> In the present case, the prosecution has failed to introduce any evidence either circumstantial or direct to establish and prove an unlawful purpose at the time of the defendant's possession of the vehicle. Under the evidence presented at trial, the defendant drove the vehicle for one evening and then parked it at the address of the registered owners. He did nothing to alter its appearance, impair its future usefulness to the owners or reduce

> its subsequent economic value. The defendant requested no reward or other compensation for its return and did not dispose of it under circumstances that would make it unlikely the owners would recover it.

Id. at 402-03 (footnotes omitted).

The supreme court concluded that the evidence would not support a finding that Murphy acted purposely to deprive the owners of their property and therefore "the very essence of the culpable activity" underlying the commission of the charged offense had not been established.

In the case before the court, the subject property apparently never left the condominium complex. It remained in the parking lot, a little more than 15 feet from the rental unit, in plain view of any person approaching Elsberrys' condominium. Indeed, Elsberrys observed the pillows in the hatchback of defendant's inoperable car the first time they returned to the condominium after Corwells had vacated the premises. The observations which the supreme court made concerning the vehicle which was the subject matter of the Murphy prosecution apply as well to the property which is the subject matter of the instant case. Moreover, unlike Murphy who made some use of the subject property, there is no evidence that the defendant here placed the pillows in the car, made any use of them, and in any way "acted purposely" to deprive the owners of their property.

Instead of presenting any evidence of defendant's intent to deprive, the state resisted instructions which would have clearly informed the jury of the specific intent element of the subject offense and argued that because the defendant "took responsibility for the safekeeping of [Elsberrys'] property" (R 226), she was guilty whether or not she took the pillows and put them in the car (R 235), and "whether she

really wanted the pillows or not" (R 234). The crime was complete in her possession of another person's property. More specifically, she was worthy of punishment because "[s]he didn't feel that her actions were anywhere wrong, even though she had possession of somebody else's property" (R 234).

> [BY THE STATES PROSECUTOR]: [Defendant had] every opportunity to look through the belongings that she had control of in her car, in her storage unit, and in finding that she had property belonging to the Elsberrys, bring it back.

R 227.

An intent to deprive Elsberrys of their pillows cannot be reasonably inferred from nothing more than the defendant's failure to take the initiative to take the pillows from the car back into the condominium. The judgment must be reversed and the case dismissed.

POINT II

THE DISTRICT COURT ERRED IN REFUSING TO GIVE DEFENDANT'S PROPOSED SPECIFIC INTENT INSTRUCTION.

Defendant proposed a specific intent instruction (R 80-81, 220-21) which was based on the patterned specific intent instruction promulgated by the Federal Bar Association, Utah Chapter. The state objected to the instruction (R 222-23) and the court refused to give it (R 220-24).

The absence of a specific intent instruction facilitated the argument advanced by the state's prosecutor in closing.

> [BY THE STATE'S PROSECUTOR]: Ms. Corwell moved into Mr. and Mrs. Elsberry's home, knowing that the property in the home did not belong to her, it belonged to Mr. and Mrs. Elsberry. She, along with her sister, took responsibility for the safekeeping of that property with a full understanding that when they left the

> property -- when they left the home, the property that did not belong to her would remain there. That did not happen. You may be asked to think that this is a childish irresponsibility, it is not. The Elsberry's were invaded.
>
> Officer Matthews . . . gave Miss Corwell every opportunity to look through the belongings that she had control of in her car, in her storage unit, and in finding that she had property belonging to the Elsberrys, bring it back.
>
> . . . .
>
> To knowingly and intentionally deprive a person of what is rightfully there's [sic], no matter how matter how large or no matter how small. No big deal?
>
> . . . .
>
> I repeat, this is not a case of childish irresponsibility, Ms. Corwell knowingly and intentionally deprived Elsberrys of their property. Now, whether she really wanted the pillows or not doesn't matter. She didn't give them back, because she didn't feel guilty. She didn't feel guilty. She didn't feel that her actions were anywhere wrong, even though she had possession of somebody else's property. Property that was only recovered by the police, not because she brought them back.
>
> . . . .
>
> Her taking of the items and putting them in her car is not a necessary element of this crime. What she did requires a finding of guilt, whether she put them in there, or her sister put them in there. She knew from the beginning that she had some stuff; her sister had some stuff.

R 226-28, 234-35.

The law-trained may well view the foregoing as a clear reference to the element of specific intent and the prosecutor's contention that the state had carried its burden of proving that the defendant acted purposely to deprive Elsberrys of their property. However, the argument suggests that having undertaken the "responsibility for the safekeeping of [Elsberrys'] property," the defendant was guilty when she failed

to take affirmative action to restore the property regardless of her intent in acting or in failing to act.

While a jury box full of lawyers may have been able to glean the specific intent element of the offense from the instructions which were given, the layman who has no background in the principles of the criminal law and the common law distinction between larceny and trespass to chattels may have easily been lead to believe that, if the defendant failed to act promptly to restore the pillows to Elsberrys once she knew they had been placed in her car, the specific intent would be made out.

In State v. Potter, 627 P.2d 75 (Utah 1981), the Utah Supreme Court reversed the defendant's conviction because the jury instructions "failed to explain adequately the distinction between general and specific intent requirements or relate those requirements to the facts of the case. . . ." Id. at 78. In concurring in the reversal of the conviction, Justice Stewart wrote:

> Although the instructions used the term "specific intent," they did not define that term. However meaningful that term of art may be to lawyers, it clearly fails to convey the intended legal meaning to jurors unless it is carefully and precisely defined. Absent such a definition, the jury could not possibly find all of the necessary elements of the crime, especially in view of the defense relied upon in this case.

Id. at 81.

Defendant respectfully submits that the instructions given in the instant case did not acquaint the jury with the concept of specific intent. Where an offense by its very definition requires specific intent, that intent is as much an element of the offense as the act itself.

POINT III

DEFENDANT WAS PREJUDICED BY THE PROSECUTOR'S MISCONDUCT.

After defense counsel closed, the state's prosecutor made the following argument in rebuttal:

> [BY THE STATE'S PROSECUTOR]: Mr. Pendleton and I could stand up here and compare war stories about our respective years and about what we do. I, too, was a defense attorney for many years, and while in this position now as a prosecutor, I'm not allowed to comment on whether or not a defendant chooses to take the stand, what I can tell you is that there are many reasons why a defense attorney might advise his client to either testify or not testify.

R 233-34.

The prosecutor not only commented on defendant's silence but invited the jurors to speculate about the "many reasons why a defense attorney might advise his client . . . not to testify" (R 234). This was error. See Griffin v. California, 380 U.S. 609 (1965).

When such a comment is made before the jury, the potential for prejudice is manifest. The error requires reversal of the resulting judgment of conviction unless it appears, beyond a reasonable doubt, that the error was harmless. See State v. Eaton, 569 P.2d 1114 (Utah 1977). Only when the evidence of guilt is overwhelming can such an error be said to be harmless beyond a reasonable doubt. This is not such a case.

Defendant's failure to draw the district court's and the jury's attention to the improper comment by making a contemporaneous object does not preclude appellate review. A criminal defendant does not waive the right to appellate review by his failure to make contemporaneous objection to the state's improper comment where the prosecutor's misconduct rises to the level of fundamental error. See Harris v. State,

645 P.2d 1036, (Okla.Crim.1982). Typically, improper comment challenges arise in the context of statements which arguably allude to the defendant's silence but do not directly comment thereon. The error, if indeed there is any, cannot ordinarily be characterized as "plain" or "fundamental" where the comment does not clearly direct one attention to the defendant's silence. Error is fundamental when the prosecutor's comment makes a direct reference to the defendant's failure to testify. See id., at 1038; State v. Baca, 89 N.M. 204, 549 P.2d 282 (1976)(prosecutor's direct reference to defendant's silence is reviewable as "plain error").

CONCLUSION

Based upon the foregoing, it is respectfully submitted that defendant's of conviction must be reversed.

RESPECTFULLY SUBMITTED this 17 day of July, 1996.

/s/
Gary W. Pendleton
Attorney for Defendant and Appellant

DELIVERY CERTIFICATE

I do hereby certify that on this 17 day of July, 1996, I did personally deliver two true and correct copies of the above and foregoing document to Marlynn B. Lema, Deputy Washington County Attorney at 178 North 200 East, St. George, Utah.

/s/
Gary W. Pendleton

ADDENDUM

76-6-408. Receiving stolen property — Duties of pawnbrokers.

(1) A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding the property from the owner, knowing the property to be stolen, intending to deprive the owner of it.

(2) The knowledge or belief required for Subsection (1) is presumed in the case of an actor who:

(a) is found in possession or control of other property stolen on a separate occasion;

(b) has received other stolen property within the year preceding the receiving offense charged;

(c) being a dealer in property of the sort received, retained, or disposed, acquires it for a consideration which he knows is far below its reasonable value; or

(d) if the value given for the property exceeds $20, is a pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or an agent, employee, or representative of a pawnbroker or person who buys, receives, or obtains property and fails to require the seller or person delivering the property to:

(i) certify, in writing, that he has the legal rights to sell the property;

(ii) provide a legible print, preferably the right thumb, at the bottom of the certificate next to his signature; and

(iii) provide at least one other positive form of picture identification.

(3) Every pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, and every agent, employee, or representative of a pawnbroker or person who fails to comply with the requirements of Subsection (2)(d) shall be presumed to have bought, received, or obtained the property knowing it to have been stolen or unlawfully obtained. This presumption may be rebutted by proof.

(4) When, in a prosecution under this section, it appears from the evidence that the defendant was a pawnbroker or a person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or was an agent, employee, or representative of a pawnbroker or person, that the defendant bought, received, concealed, or withheld the property without obtaining the information required in Subsection (2)(d), then the burden shall be upon the defendant to show that the property bought, received, or obtained was not stolen.

(5) Subsections (2)(d), (3), and (4) do not apply to scrap metal processors as defined in Section 76-10-901.

(6) As used in this section:

(a) "Receives" means acquiring possession, control, or title or lending on the security of the property;

(b) "Dealer" means a person in the business of buying or selling goods.